

Fact Sheet
Military Commissions
8/30/2007

- Military commissions have historically been used to prosecute enemy combatants who violate the laws of war. The last time the United States used the military commission process was in the context of World War II.
- Military Commissions provide:
 - Judicial guarantees recognized as indispensable by civilized peoples for purposes of Common Article 3 of the Geneva Conventions;
 - Appropriate protection of national security interests; and
 - Protection and safety for all personnel participating in the process, including the accused.
- The Military Commissions Act of 2006 establishes procedures governing the use of Military Commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by Military Commission. The Military Commissions Act of 2006 authorizes the President to establish these Military Commissions while recognizing the Commander-in-Chief's Constitutional authority to convene commissions during times of martial law and in occupied areas.
- The Military Commissions Act of 2006 establishes jurisdiction over any alien unlawful enemy combatant. The Military Commissions Act of 2006 defines alien unlawful enemy combatant as:
 - A person who has engaged in hostilities or has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
 - A person who has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal established under the authority of the President or the Secretary of Defense.
- The Prosecution drafts charges, when appropriate, on individuals subject to the Military Commissions Act of 2006. Charges may then be sworn by any person subject to the Uniformed Code of Military Justice.
- The Convening Authority decides whether to refer any or all charges to trial. Referral is an act that directs the convening of a military commission and details military officers to act as members for each commission trial.

- The Convening Authority appoints the Chief Judge of the Military Commissions Trial Judiciary. That Chief Judge then details a military judge to each case referred to trial by the convening authority. The trial judges are all made available for commissions duty by the Judge Advocates General of their services.
- Each military commission consists of a military judge and at least five members. Commission members would be referred to as “jurors” in a civilian court. In a case where the accused may be sentenced to death, a minimum of twelve members and unanimous agreement are required.
- The military judge of a military commission must be certified in accordance with the Uniform Code of Military Justice. The military judge rules upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.
- Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission.
- The MCA and commission rules provide the following protections for the accused:
 - The presumption of innocence;
 - A requirement for proof of guilt beyond a reasonable doubt;
 - Representation by an independent military defense counsel free of charge with the option to retain civilian defense counsel. Civilian defense counsel must be U.S. citizens.
 - Foreign consultants available for consultation during the proceedings.
 - Presence of accused at all proceedings of the military commission, other than those for deliberations and voting. The military judge may only exclude the accused if the accused persists in conduct that is disruptive or threatens the physical safety of individuals.
 - An opportunity to present evidence and call witnesses;
 - A requirement that the accused be provided evidence to be introduced against him or her at trial;
 - Protection from self-incrimination at trial, and most common law evidentiary privileges;
 - The appropriately qualified right to self-representation;

- Suppression of statements obtained by torture or in violation of the Detainee Treatment Act of 2005;
 - Prohibition against drawing an adverse inference if an Accused chooses not to testify; and
 - A thorough, comprehensive and independent appellate system, including appeals to U.S. civilian federal courts.
- The military judge may admit evidence that would have “probative value to a reasonable person.” Evidence may not be excluded on the grounds that it was not seized pursuant to a search warrant. This standard of evidence takes into account the unique battlefield environment that is different from traditional peacetime law enforcement practices in the United States.
 - A finding of guilt and the imposition of a sentence must be with the concurrence of at least two-thirds of the Military Commission members. Sentences that include confinement for ten years or more must be concurred in by at least three-fourths of the members.
 - If there is a finding of guilt, the military commission members may impose any appropriate sentence, including death if the case is referred as a capital case by the convening authority. A sentence of death requires a unanimous vote of at least twelve members as to both findings and sentence.
 - After the military commission has delivered its verdict and imposed a sentence:
 - All records of trial must be reviewed by the Legal Advisor’s office and may be reviewed by the Convening Authority. The Convening Authority may take action on the sentence only after consideration of any and all matters submitted by the accused, as well as the recommendation of the Legal Advisor. In the event of conviction, the Convening Authority can reduce the sentence, dismiss any charges or specifications or order a rehearing for any charge for which the accused was convicted. The prosecution cannot appeal any mitigation action by the Convening Authority.
 - Each case which includes a finding of guilt is referred to the Court of Military Commission Review. The Secretary of Defense has established a Court of Military Commission Review composed of at least three appellate military judges. The judges may be military or civilian.
 - The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to determine the validity of any final decisions of a Military Commission case. The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals.